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17 June 1977

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CM #142 ?

MEMORANDUM FOR: Director of Central Intelligence

VIA : Deputy Director of Central Intelligence

FROM : Anthony A. Lapham
General Counsel

SUBJECT : ☐ Limitations Upon DCI Access to NSA Intercept
Materials

1. ☐ Action Requested: None. You have asked for my comments concerning the memorandum sent you by the Director, NSA entitled "Pre-Publication Review of SIGINT Product." Specifically, you have asked whether limitations may be placed on the foreign intelligence information made available to you from NSA; you have also asked whether any foreign intelligence information can be made available by NSA to other officials of government which has not also been made available to you.

2. ☐ Background: The legal authorities indicate that the Director of Central Intelligence has a guarantee of access to information, including intercepts, relevant to the foreign intelligence needs of the United States. That access is limited, however, by restrictions imposed by Fourth Amendment requirements prohibiting unreasonable search and seizure and the Attorney General's electronic surveillance procedures promulgated pursuant to Executive Order 11905.

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25X1 4. ☐ The National Security Council Intelligence Directives (NSCIDs) provide direction to the Director of Central Intelligence regarding his overall intelligence duties. NSCID No. 1, paragraph 1, directs that:

The Director of Central Intelligence shall coordinate the foreign intelligence activities of the United States in accordance with existing law and applicable directives. Such coordination shall include those forms of intelligence that constitute the foreign intelligence activities of the United States.

The DCI is directed to provide for the interchange of "...intelligence, intelligence information and other information with utility for intelligence purposes," NSCID No. 1, paragraph 3g(2), and "...shall make such surveys of departmental intelligence activities of the various departments and agencies as he may deem necessary in connection with his duty to advise the National Security Council and to coordinate the intelligence effort of the United States." NSCID No. 1, paragraph 3(h). The Director also shall "...ensure that on intelligence matters affecting the national security the intelligence community is supported by the full knowledge and technical talent available in or to the Government." NSCID No. 1, paragraph 8(a)(2).

25X1 5. ☐ Executive Order 11905 also provides definitive statements in support of the Director's access to foreign intelligence information:



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To assist the DCI in the fulfillment of his responsibilities, the heads of all departments and agencies shall give him access to all information relevant to the foreign intelligence needs of the United States. Relevant information requested by the DCI shall be provided, and the DCI shall take appropriate steps to maintain its confidentiality. (Emphasis added). Section 3(d)(4).

Section 4a(6) of the Order provides that senior officials of the Intelligence Community shall:

...furnish to the Director of Central Intelligence, the CFI, the Operations Group ... all of the information required for the performance of their respective duties. (Emphasis added).

The standards of these provisions dictate that the information be relevant to the foreign intelligence needs of the United States and that it be in fulfillment of the Director's responsibilities. Thus legitimate foreign intelligence information upon which there are no legal restrictions on dissemination may not be denied the Director. As the drafter's annotations to the Executive Order state at one point:

This provision [§3d(4)] is designed to ensure that the Director receive all relevant foreign intelligence information coming into the possession of the departments and agencies of our Government. (Emphasis added).

25X1 6. ☐ The applicability of these provisions to the National Security Agency (NSA) is acknowledged in Section 4(e)(2)(ii)(c) of Executive Order 11905 which provides that the NSA functions and responsibilities include:

Collection, processing and dissemination of signals intelligence in accordance with objectives, requirements, and priorities established by the Director of Central Intelligence. (Emphasis added).

Thus, while the Director of NSA exercises control over signals intelligence (SIGINT) collection and processing activities, he must collect and disseminate information in accordance with the requirements established by the Director of Central Intelligence.

25X1 7. ☐ However, Executive Order 11905 also places certain restrictions on foreign intelligence collection activities. Among these, Section 5(b)(2) of the Order prohibits:

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...Electronic surveillance to intercept a communication which is made from, or is intended by the sender to be received in, the United States, or directed against United States persons abroad, except lawful electronic surveillance under procedures approved by the Attorney General;

Pursuant to this provision the Attorney General has promulgated procedures which are binding upon NSA in its signal intelligence activities, which the Attorney General regards as a form of electronic surveillance. These procedures, grounded for the most part on legal requirements, represent a limitation of sorts on your right of access to all information collected within the Intelligence Community.

25X1 8. ☐ The procedures are intended to control that information which involves United States persons. For example, they limit NSA to intentionally intercepting only foreign communications. NSA cannot deliberately intercept the communications of a U.S. person unless the Attorney General is convinced that the person may be a foreign agent. Nor can NSA deliberately intercept communications where a U.S. person is simply mentioned, unless the Attorney General is convinced that significant foreign intelligence can be obtained thereby. Even in foreign communications where it is unexpectedly learned that a U.S. person is communicating or is mentioned, certain enumerated criteria must be met before the data can be retained and used within NSA with the identities of the U.S. persons intact. If the conditions cannot be met the identities must be deleted. Still further criteria must be met, including an NSA judgment concerning the intended recipients' need-to-know, before this latter material can be disseminated outside NSA with the identities of U.S. persons intact. Of course most of these Attorney General functions are delegated to NSA officials in routine operations. In special circumstances, however, the Attorney General is, in fact, called upon.

25X1 9. ☐ Thus, pursuant to these guidelines established by the Attorney General, NSA does make certain judgments concerning the communications which are or are not intercepted, judgments about whether the content is significant foreign intelligence and whether certain other enumerated criteria affecting dissemination have been met, and judgments about who may receive this data. In theory at least, certain of the information which would have constituted relevant and lawful foreign intelligence could be deleted or unnecessarily restricted in dissemination due to errors of judgment in this screening process.

25X1 10. ☐ In connection with the administration of the Attorney General guidelines, the Director, NSA, has adopted the procedures set out in his memorandum to you of 7 April. One aspect of these procedures may not be a strict requirement of the Attorney General guidelines. That is, in certain circumstances NSA follows a practice of withholding certain particularly sensitive information involving U.S. officials, on the instruction of the U.S. official involved. This apparently can happen, for example, where a

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prominent official of this government may hold a private discussion with a representative of a foreign government. Subsequently, the foreign representative reports to his government, and NSA intercepts the message. Through this interception details of the conversation become available which the prominent official of this government may have deliberately chosen not to reveal. In such a case, NSA would solicit the opinion of the U.S. official involved, and seek his guidance as to further dissemination. General Allen does give you his assurance, however, that he "...will not allow significant foreign intelligence to be withheld from you without bringing the issue to you personally."

25X1 11. ☐ With the possible exception of the procedure discussed just above, I believe General Allen's letter fairly states the rules under which he must operate pursuant to the Attorney General's guidelines concerning electronic surveillance. As to that procedure, which would appear to have the endorsement of the Secretary of Defense, and perhaps others as well, you may wish to discuss the matter more fully with the Secretary of Defense and the Director, NSA, to assure yourself that your own expectations concerning the availability of relevant foreign intelligence are being met.

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Anthony A. Lapham

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